DATE OF ISSUANCE: APRIL 14, 1999

CASE NO. 1998-STA-30

In the Matter of

OTIS BATES
Complainant

V.

WEST BANK CONTAINERS
Respondent

APPEARANCES:

Thomas A. Paige
Office of the Solicitor
U.S. Department of Labor
525 Griffin Street, Suite 501
Dallas, Texas 75202
For the Complainant

G. Patrick Hand, Esq.
The Hand Law Firm
504 Huey P. Long Avenue
Gretna, LA 70053
For the Respondent

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

RECOMMENDED DECISION AWARDING COMPENSATION

This proceeding arises under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31101 et seq. (1988) and the regulations promulgated thereunder, 29 C.F.R. Part 1978. The instant case arises under Section 405, the employee protection provision of the STAA. In addition to protecting an employee from discharge, discipline or discrimination for filing a complaint about safety or refusing to operate a vehicle in violation of Federal rules or because of apprehension of serious injury due to unsafe condition, 49 App. U.S.C. §§ 2305(a), (b), the statute provides an administrative remedy to employees who believe that they have been discharged in violation of the statute. The Secretary of Labor is empowered to investigate and determine complaints of violations of this employee protection or "whistleblower" provision. Section 405 authorizes the Secretary of Labor to conduct a preliminary investigation in order to determine whether there is reasonable cause to believe that the complaint has merit. Id. §2305(c)(2)(A). The Secretary, upon a finding of probable cause, must issue a preliminary order

of abatement or reinstatement if the employee is discharged. 49 App. U.S.C. § 2305(c)(2)(B).

This claim is brought by Otis Bates, Complainant, against his former employer, West Bank Containers, Respondent. A hearing was held in New Orleans, Louisiana on November 4,1998. Both parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1) Solicitor's Exhibits Nos. 1, 2A, 2B, 3-6; and

2) Respondent's Exhibits Nos. 1-4.[1]

Issues

The issues in this proceeding are:

1. Whether Complainant engaged in activities subject to protection under the STAA?

2. Whether Respondent terminated Complainant in violation of the STAA because he engaged in activities subject to protection under the statute?

Summary of the Evidence

Otis Bates

Otis Bates testified that he began employment with Respondent on May 5, 1998 utilizing his own tractor trailer to transport containerized freight in and around the City of New Orleans. Complainant stated that he was leased to Respondent for the period May 5 until June 12, 1998. Complainant testified that he has had his commercial driver's license since 1995. TR pp. 21, 22.

Complainant testified that there is a Department of Transportation mandated 80,000 pound limit on the total weight of tractor and trailer. Complainant added that anything in excess of the allowable limit required a permit. He stated that his tractor weighs 16,420 pounds. TR pp. 22, 23.

Complainant testified that he signed a contract agreement with West Bank Container Service. Complainant stated that he believed that Jimmy O'Brien signed his agreement, but admitted that the name on the contract was Johnny Comeaux. TR pp. 23, 24.

Complainant testified that a dray constitutes moving a container from one location to another. He explained that a container is a box mounted on a chassis with wheels on the back with the freight

[1] The following abbreviations will be used in citations to the record: SX - Solicitor's Exhibit, RX - Respondent's Exhibit, and TR - Transcript of Proceedings.

sealed inside. Complainant stated that the tractor is coupled with the trailer and moves to the destination. Complainant testified that he was compensated weekly at the rate of $35 per one way dray if the transport crossed the river and $25 if the dray was on the West Bank. TR pp. 24, 25.

Complainant testified that on June 12, 1998, Mr. Jody of West Bank Container dispatched him to take an empty container from West Bank's yard to Norfolk Southern Railroad in eastern New Orleans and return with the chassis. Complainant stated that after completing this charge, he was to proceed next door to Union Pacific Railroad and pick up a container. Complainant testified that he drove to the Union Pacific yard, located and hooked up the container, and performed the normal checks. Complainant stated that upon departing through the check out gate, he received a document referred to as an interchange from Union Pacific. Complainant testified that the document included the identification number of the container, the origin of the container, and the container's weight. Complainant stated that the document noted that the container weighed 67,700 pounds. TR pp. 25, 26; SX-2A.

Complainant testified that he transported the container from the Union Pacific Railroad located in Avondale, Louisiana to CSX Railroad in New Orleans East using a route across the Huey P. Long Bridge along I-10 East to I-610 and then back to I-10. Complainant stated that just past the I-10/I-610 split, he initiated a gradual lane change and the container began to sway causing momentary loss of control. Complainant testified that when he regained control he decreased his speed to 30 to 35 miles an hour because he thought that the swaying made it unsafe to proceed at the normal speed. Complainant explained that because he was in the middle lane of the interstate he believed that it was unsafe to pull off the roadway. He stated that this incident occurred approximately one half way to his destination. Complainant testified that upon reaching his destination, he checked in and then proceeded across a speed bump to the inspection bay where the container is examined for damage. Complainant stated that as he crossed the speed bump, the whole casing of his left front outage tire blew off. Complainant added that he pulled into the bay where the clerks performed the inspection as he checked the tire. Complainant testified that CSX personnel supplied an interchange that indicated the destination of the container and the weight which was documented to be 59,711 pounds.[2] He added that prior to receiving the interchange he had formed the opinion that his vehicle was overweight based on the swaying and the fact that the entire sidewall of the tire had blown out. Complainant testified that if the weight of his tractor was that noted on the interchange supplied him at the initiation of his dray 67,700 pounds, the vehicle exceeded the 80,000 limit, but if the interchange at destination was correct the vehicle did not exceed the limit. TR pp. 29-34; SX-3.

Complainant testified that after dropping the container at the rear of the terminal he proceeded to call his dispatcher to apprise him of the problem. Complainant stated that the call lasted four to five minutes. Complainant testified that he told the dispatcher of the blowout and inquired

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[2]The weight included in the interchange given to Complainant at the initiation of the dray noting that the container weighed 67,700 pounds conflicts with the interchange given to Complainant at his destination which noted the container weighed 59,711 pounds. SX-2, 3.

as to the whether the dispatcher knew that the vehicle was overweight. Complainant stated that the dispatcher remarked that he needed to get a tire and, when asked if he had knowledge of the overweight situation, he added that they were all that way. Complainant testified that he then returned to West Bank Container terminal. TR 35, 36.

Complainant testified that upon reaching the terminal he entered the office to pick up his pay check. Complainant testified that Mr. O'Brien inquired as to his reason for being there and he answered that it was to pick up his check. Complainant stated that he informed Mr. O'Brien that he did not have a problem with hauling freight, however, he did have a problem with "doing anything that was unsafe." Complainant stated that Mr. O'Brien referred to his seeking compensation for the blown tire, wherein he made him aware that he was there only to pick up his check. Complainant testified that "...next thing I knew it got out of hand." Complainant stated that Mr. O'Brien then cursed him and told him to leave. Complainant testified that he then requested that Mr. O'Brien not yell and curse at him. He stated that Mr. O'Brien continued to curse him and told him he was fired. Complainant stated that he asked Mr. O'Brien how he could fire him for not wanting to do something that was unsafe. Complainant added that Mr. O'Brien said "...you're just fired. Take our placards off your truck." Complainant testified that he then asked Mr. O'Brien if there was anyone else to whom he could speak. Complainant stated that Mr. O'Brien told him that he could speak to Mr. Wactor just as Mr. Wactor was walking in the door. Complainant testified that he asked to speak to Mr. Wactor in private, whereupon he informed Mr. Wactor that he did not want to be forced to pull containers that were over gross. Complainant stated that Mr. Wactor told him that he could not handpick his loads. Complainant testified that he then said that he had to be concerned about his safety. Complainant stated that Mr. Wactor was very understanding and did not then state that he was terminated. TR 37-40.

Complainant testified that there is a Department of Transportation (DOT) rule that mandates the use of warning triangles and flares if a tractor is parked alongside the road in excess of fifteen minutes. He stated that if he had parked his tractor-trailer on the side of the road he would have had to use the warning devices or he would have been in violation of the regulations. TR 39, 40.

Complainant testified that records submitted include his pay stubs and a listing of actual dray moves. Complainant stated that 8% for insurance and fuel costs were deducted from his pay. Complainant added that he was not aware that there was a deduction for a bond, but did agree that that is what was shown on his record. Complainant testified that he did not know the total net pay that he received from Respondent for the period from May 5, 1998 through June 12, 1998. Complainant responded that he did not want to return to work for Respondent, but would like his lost wages for the period from June 12, 1998 to August 11, 1998. TR 41-; SX-4.

Complainant testified that he did not receive benefits from Respondent. During the trial, Complainant stated that he worked currently for Triple G Express, but was working less than he did for Respondent. Complainant confirmed that his net income from Triple G for the month of September 1998 was $3881.21. Complainant added that he paid Mr. Jay Ginsberg $40.00 to file a

complaint with the Occupational Safety and Health Administration. TR 46, 47, 51-53; SX-6.

Complainant testified that he purchased his vehicle approximately one and one half years prior to May 1998. Complainant stated that his vehicle registration showed the maximum weight his tractor and trailer were licensed to carry was 80,000 pounds. Complainant added that he now understood that he could get a permit to haul a load in excess of the limit, but was never informed of that by Respondent. Complainant testified that he signed a trip lease agreement with Respondent. He responded that the agreement included an obligation to comply with all state and federal regulatory laws. Complainant stated that he was allowed to haul for other carriers during the tenure of his agreement with Respondent. Complainant testified that he was not aware that the agreement stated that 22.5% of compensation was driver payroll with the remaining balance allotted to rental of the vehicle and expenses. Complainant stated that he had not had a delineation of salary and reimbursement in any prior agreement. Complainant testified that for federal income tax purposed he allotted 9% off the top for vehicle expenses. TR 55-61, 98; RX-1.

Complainant testified that he understood that he must report within twenty-four hours any incident occurring while engaged in work under the agreement with Respondent. He stated that the only such incident was the one related to his blown tire. Complainant added that he told Mr. Thiaville and Mr. O'Brien, but did not give a written report as he was fired before he could do so. Complainant explained that he was aware of a provision in the agreement stating that he did not have any employee status with Respondent. Complainant testified that he considered himself a contractor with Respondent and did not perform work for anyone else during his tenure there. Complainant stated that although he was not mandated to arrive at Respondent's yard at a specific time, it was recommended that he show up around six in the morning. TR 61-64; SX-2.

Complainant testified that he was given the document by Union Pacific showing the load to be 67,700 pounds at the time he picked up the load on June 12, 1998. Complainant stated that he had never used the scale provided by Respondent because he was never informed of their existence. Complainant testified that he examined the container before leaving the Union Pacific Railroad yard and decided to pull the container because the common, surface scrape on the tire would not affect transportation. TR 67-70.

Complainant testified that when he left Avondale Container he made a wide turn onto Garden Road, turned onto Highway 90, and proceeded to the Huey P. Long Bridge. Complainant stated that he did not make any turns between the point where he turned onto Highway 90 and he reached the bridge. Complainant testified that the vehicle did not sway at any time during that aspect of his trip including during the negotiation of the traffic circle. TR 70-74.

Complainant testified that he was not sure that Federal law required that he stop immediately upon determination that the load he carried was unsafe. Complainant stated that he believed that it would be more unsafe to park on the side of Interstate 610 where there was inadequate parking for his vehicle than to proceed at a reduced speed. Complainant testified that there is a shoulder on the right side of the road, but that it was not wide enough for his vehicle. He

stated that he was attempting to change lanes when the vehicle began to sway but was on an incline when he realized that the vehicle may be overweight. Complainant testified that he was approximately fifteen minutes from his destination when the incident occurred. Complainant stated that the tire blew out in the yard of CSX Railroad immediately after he negotiated a speed bump. Complainant added that he felt the overweight load caused the blowout, but had not had the tire examined to determine if that was the reason. TR 75-80.

Complainant testified that he was a trip lease driver for Triple G with responsibility for the insurance, maintenance, and repair of his vehicle. Complainant stated that his trip lease agreement with West Bank Container included that his equipment must be maintained in good condition at all times, including regular maintenance, repairs, and parts. TR 80, 83.

Complainant testified that prior to executing the trip lease agreement he remembered filling out "something" but could not recall if it was actually an application for employment. Complainant stated that he worked as a truck driver for Triple G Express prior to signing with Respondent. He added that Triple G was the first place he worked after purchasing his truck. Complainant testified that he did not complete the form "Request for Information from Previous Employer" because Mr. O'Brien told him to start working and he would get the information later. Complainant added that Mr. O'Brien did not ask and he did not supply the information although he did tell Mr. Thiaville, the dispatcher, that he had worked for Triple G. TR 85-88.

Complaint testified that during the period from June 12, 1998 through August 11, 1998 he only worked for three days under a trip lease agreement in mid-July for Larsen Intermodal, but quit because he was operating at a loss as they did not have enough work. Complainant stated that his wife was pregnant and he was pressured to get a job and the Larsen position was all he could find after filling out several applications. Complainant testified that he did not incur expenses during the period that he was unemployed. TR 92-95; RX-4.

Complainant testified that although his trip lease agreement included that 22.5% of his pay was compensation for payroll and the rest is for upkeep, fuel, maintenance, and related expenses, he understood that he was compensated $35.00 per dray and there was 8.1 percent reimbursed to Respondent for insurance and additional reimbursement for fuel costs. TR 99; SX-1.

Jody Thiaville

Jody Thiaville, dispatcher for Avondale Container, testified that Avondale Container is a storage and repair yard for containers from seagoing vessels for transportation over land. Mr. Thiaville stated that West Bank Container is the trucking section of Avondale Container which moves containers from point to point within the City of New Orleans and beyond. He added that

as dispatcher he has ordered trucks to Alabama and Texas. Mr. Thiaville testified that an owner/operator owns his own vehicle, but a company operator operates a company vehicle. He explained that an owner/operator in May 1998 earned $35.00 for each one-way local dray. Mr. Thiaville stated that Complainant was an owner/operator. TR 102-104.

Mr. Thiaville testified that Complainant came in every day and never refused to haul a dray while he worked for Respondent. Mr. Thiaville stated that he had a five minute conversation with Complainant the day he was terminated. Mr. Thiaville testified that during the conversation with Complainant Mr. O'Brien was approximately ten to fifteen feet away in the same office. Mr. Thiaville testified that Complainant stated that he was carrying an overweight load, and if he ever had another container that he thought was overweight, he would drop it wherever he was at. Mr. Thiaville stated that he relayed Complainant's statement to Mr. Wactor about one o'clock that afternoon, but Complainant spoke to Mr. O'Brien himself. Mr. Thiaville stated that he had nothing to do with the hiring or firing of Complainant. TR 105-110.

Mr. Thiaville testified that if a container is believed to be overweight, it is weighed and the state is notified, and a permit is sent by facsimile. An authorization number is procured over the phone. Mr. Thiaville explained that this happens often with refrigerated trucks. Mr. Thiaville testified that the owner/operators are made aware of the necessity of requesting a permit and they know where the scales are located. Mr. Thiaville stated that the scale, which is one hundred and twenty feet long and ten feet wide, is located just inside the gate. TR 110-112.

Mr. Thiaville testified that the interchange agreement between the container yard and the steamship company is, by law, given to every driver and the document is returned the Respondent's office at the end of the dray. Mr. Thiaville stated that it is the driver's responsibility to ensure that he is complying with all state and Federal laws. Mr. Thiaville answered that Complainant indicated to him that if he had an overweight load he was going to drop it in the street which is a violation of state and Federal laws. Mr. Thiaville admitted that in his deposition he did not testify that Complainant stated that he would drop the load in the street. Mr. Thiaville admitted that he did have a chance to review his deposition, but did not make any changes to it. Mr. Thiaville admitted that in his deposition, in response to the question "At any time did Mr. Bates say that he would — did he actually say he would drop the container in the street or on the highway or was that your understanding of what he meant?", he answered, "that's what he said. He would drop it anywhere." Mr. Thiaville testified "same thing", he said he would drop it anywhere. TR 113-118; SX-2A.

James O'Brien

James O'Brien, trucking department superintendent for Avondale Containers, testified that Michael O'Brien, president of Avondale Containers, is his brother. Mr. O'Brien stated that he was responsible for hiring Complainant and he complied with all the state and Federal regulations in the hiring process. Mr. O'Brien testified that he terminated Complainant because he threatened to drop a container in the street. Mr. O'Brien stated that he did not speak with Complainant

himself, he overheard Complainant speaking with Mr. Thiaville for approximately a minute from a distance of eight to ten feet. Mr. O'Brien testified that he did not remember anything Mr. Thiaville said and did not ask Mr. Bates what he meant by his statement. Mr. O'Brien stated that he never at any time spoke to Mr. Thiaville about the interchange with Mr. Bates. Mr.O'Brien admitted that he drafted and signed a letter under the direction of Mr. Wactor which stated, "Today Mr. Bates informed us he would not haul any heavy loads and if he found that the load was too heavy, he would

drop it at that point." Mr. O'Brien admitted that nothing in the letter stated that Complainant would drop a load in the street. Mr. O'Brien stated that he did not consult an attorney before composing the letter. TR 119-124.

Mr. O'Brien testified that Complainant had indicated that he graduated from school, but had not been employed. Mr. O'Brien stated that he checked Complainant's driving record and found no violations. Mr. O'Brien stated that Complainant signed a form including that he was hired with a standard probationary period of sixty days. TR 125-129; RX-1.

William Wactor

William Wactor, vice president of operations for Avondale Containers, testified that local owner/operators are paid per dray. Mr. Wactor stated that the decision to terminate Mr. Bates was made while conversing with him. Mr. Wactor testified that he could not recall whether Complainant stated that he thought the blown tire was due to the container being overweight. Mr. Wactor stated that he terminated Complainant based on Mr. James O'Brien's report. Mr. Wactor testified that he did not investigate the statement nor discuss the termination with Mr. James O'Brien. TR 134-141.

Michael Dennis O'Brien

Michael O'Brien, owner of Avondale Container and West Bank Container, testified that the company used twelve or fourteen owner/operators. Mr. O'Brien stated that owner/operators were not considered employees because West Bank Container did not have care, custody, or control of the owner/operators. TR 142-147.

Mr. O'Brien testified that Complainant was hired by James O'Brien and that he has never met Complainant. Mr. O'Brien stated that he was not at Avondale or West Bank Container on June 12, 1998, but was informed of the incident by James O'Brien or William Wactor. Mr. O'Brien testified that if Complainant had made the statement to him that was related by Mr. O'Brien or Mr. Wactor, he would have terminated him immediately. He stated that abandoning a load on a highway or a public place was a violation of state and Federal laws. Mr. O'Brien added that both state and Federal law mandates that if there is a safety violation the operation must immediately cease. Mr. O'Brien testified that he had been in business for twenty years and had never allowed anyone to jeopardize public safety. TR 147-151.

Mr. O'Brien testified that James O'Brien had the authority to hire and fire. He stated that Complainant was on probationary status when he was fired. Mr. O'Brien stated that under the trip lease agreement, a driver was under an obligation to file 22.5% of his gross wages as labor income, a figure that was set by the insurance carrier which also charged 8.1% for insurance. TR 151-154.

Mr. O'Brien testified that he had never had a claim like Complainant's filed against him. He stated that he wrote a letter to the Secretary of Labor, after attempting to settle the matter, because he believed he would not be represented adequately. Mr. O'Brien admitted that there was nothing in the letter that indicated that Complainant said that he would drop the container in the street or abandon a container. TR 154-157.

Mr. O'Brien testified that the reference in the trip/lease agreement to rental of the vehicle refers to Complainant's vehicle. Mr. O'Brien stated that he was not familiar with the Surface Transportation Assistance Act on or before June 12, 1998. TR 159, 160.

Discussion and Conclusions of Law

Under the STAA's employee protection provision under which this case is brought:

> (1) No person shall discharge, discipline, or in any manner discriminate against an employee with respect to an employee's compensation, terms, conditions, or privileges of employment for refusintg to operate a motor vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or to the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection,
> the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 2305(b).

An "employee" for the purposes of this act is a driver of a commercial motor vehicle, a mechanic, a freight handler, or any individual other than an employer "who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety..." 49 U.S.C. app. § 2301(2). The term"employee" is specifically defined in the STAA to include independent contractors who personally operate commercial motor vehicles. See 49 U.S.C. § 31101(2). An "employer" is "any person engaged in a business affecting commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it in commerce..." 49 U.S.C. app. § 2301 (3). A "person" is "one or more individuals, partnerships, associations, corporations, business trusts, or any other organized group of individuals" for purposes of the subchapter, 49 U.S.C. app. § 2301(4).

Complainant has met the requirement of "employee" under the act as he is employed by Respondent, a commercial motor carrier, and was in the course of his employment which directly affected commercial motor vehicle safety. Complainant was transporting a dray for Respondent and experienced the sudden loss of control when his vehicle swayed resulting from what he believed was an overweight load. As previously cited, independent contractors qualify as employees. Thus, Complainant is covered under the Act.

I. Prima Facie Case

To establish a prima facie case of retaliatory discharge under the whistleblower provision invoked here, a complainant must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) that he was subjected to adverse action, and (3) that the respondent was aware of the protected activity when it took the adverse action. Auman v. Inter Coastal Trucking, 91-STA-32 (Sec'y February 24, 1992), slip op. at 2; Dartey v. Zack Co. of Chicago, 82-ERA-2 (1983), slip op. at 7-9 (case under analogous provision of ERA.) In addition, there must be an inference that the protected activity was a likely reason for the adverse action. There are three distinct types of protected activities under the provisions of the STAA: (1) safety related complaints (either external or internal), (2) refusals to operate a vehicle when the operation of the vehicle would in fact violate Federal safety standards, and (3) refusals to operate a vehicle if (a) an employee has a "reasonable apprehension of serious injury to himself or the public" because of the unsafe condition of the vehicle and (b) the employee has unsuccessfully attempted to have his employer correct the unsafe condition. 49 C.F.R. § 31105 (a)(1).

Corroborating evidence is not necessary to establish a prima facie case. In order to present a prima facie case the complainant need only to present evidence sufficient to prevail if not contradicted and overcome by other evidence. Ass't Sec'y and Brown v. Besco Steel Supply, 93-STA-30 (Sec'y Jan. 24, 1995) slip op. at 3. Thus, a complainant's testimony that he was forced to falsify logs by itself is sufficient to establish a prima facie case, *i.e.*, the complainant would prevail on the point if respondent does not introduce evidence rebutting and overcoming that allegation. Toland v. Burlington Motor Carriers, Inc., 93-STA-35 (Sec'y Feb. 27, 1995).

Protected Activity

The Secretary has held that it would be inconsistent with the purpose of the STAA to limit the coverage of paragraph (a) of section 2305 to those complaints filed with governmental agencies. The purpose of the Act is to promote safety on the highways. The Secretary stated that an employee's safety complaint to his employer is the initial step in achieving this goal.

Therefore, a driver's reporting of defects in the vehicles he has driven is an activity protected under section 2305(a). The fact that he may not have pointed to a particular commercial motor vehicle safety standard that was violated does not deprive him of coverage under the Act. Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y Mar. 19, 1987). Protection is not dependent on actually proving a violation. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-357 (6th Cir. 1992). Decision holding that complainant's refusal to drive an overweight vehicle and his communication to respondent that the refusal is based on the potential violation of federal regulations and a safety concern for himself and the public is a protected activity under the STAA. Galvin v. Munson Transportation, Inc., 91-STA-41 (August 31, 1992).

In the case sub judice, Complainant has established that he engaged in protected activity. Complainant made internal safety complaints of an overweight load which is prohibited as a hazard to the public and the driver.

Adverse Action

In Ass't Sec'y & Brown v. Besco Steel Supply, 93-STA-30 (Sec'y Jan. 24, 1995), the Secretary found that the complainant's testimony that he was fired established the adverse action element of the prima facie case. In a footnote, the Secretary noted that this testimony, standing alone, would satisfy the adverse action element of a STAA claim if not contradicted and overcome by other evidence. However, a complainant still sustains the burden of ultimately proving that the adverse action was taken because he engaged in protected activity.

In this case, there is no dispute of the fact that Respondent did take adverse action, termination, against Complainant.

Respondent's Awareness of Protected Activity

It is well established that before any respondent can be held liable for taking an adverse action against an employee, the employee must show that at the time of the adverse action the respondent was aware that the employee had engaged in some sort of protected activity. The complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y Dec. 15, 1992), slip op. at 2. The proximity in time between protected conduct and adverse action alone is sufficient to establish the element of causation for purposes of a prima facie case. Thus, where Complainant was discharged within a week of raising safety complaints about a truck, the Secretary found that Complainant raised the inference of causation. Stiles v. J.B. Hunt Transportation, Inc., 92-STA-34 (Sec'y Sept. 24, 1993). The inference is raised when the discharge immediately follows the protected activity. Bergeron v. Aulenback Transportation, Inc., 91-STA-38 (Sec'y June 4, 1992), slip op. At 3.

In the instant case, there is no challenge to Respondent's knowledge of protected activity as the internal complaint was made directly to the person who terminated Complainant. In addition, because the termination occurred immediately following the assertion of the complaint, the inference is that the complaint was the basis for the adverse action. Accordingly, evidence establishes an inference that there was a causal nexus between the Complainant's protected activity and the adverse action against him.

II. Respondent's Burden to Show a Legitimate Nondiscriminatory Purpose

If the employee establishes a prima facie case, the respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. However, this burden can be met by merely introducing evidence if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action, even if such evidence is not ultimately credited by the finder of fact. If the evidence is introduced, the presumption of discrimination created by the prima facie case is rebutted and the overall burden of proving illegal discrimination by a preponderance of the evidence remains on the complainant.

The complainant then must prove that the proffered reason was not the true reason for the adverse action. St. Mary's Honor Center v. Hicks, __U.S.__, 113 S.Ct. 2742 (1993).

In the instant case, Respondent proffers that the legitimate nondiscriminatory purpose for Complainant's termination was Complainant's alleged statement that he would, if he determined he was carrying an overweight load, immediately "drop his load in the street", thereby endangering the public. In view of the presentation of this evidence, this Court finds that the presumption created by Complainant's prima facie case has been rebutted and that the burden of proving illegal discrimination still remains on the Complainant.

III. Complaint's Burden of Establishing Violation

The ultimate burden of establishing that the respondent violated the employee protection provision of the STAA is on the complainant. Nolan v. A.C. Express, 93-STA-38, (Sec'y May 13, 1994) (citing Stiles v. J.B. Hunt Transportation, Inc., 92-STA-34 (Sec'y Sept. 24, 1993). The employee may succeed in this either by directly persuading the court that a discriminatory reason more likely motivated the employer or by showing indirectly that the employer's proffered explanation is unworthy of credence. The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee had proved actionable retaliation for protected activity. However, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The evidence establishes that the Complainant expressed safety concerns to Respondent. Testimonial evidence by Mr. Thiaville, Mr. James O'Brien, Mr. Wactor, and Mr. Michael O'Brien include references to Complainant's assertion that he did not want to carry an overweight load in the future. Respondent asserts that it was Complainant's statement that he would "drop it (the load) in the street" that necessitated the termination. However, this Court finds that the evidence does not support a finding that Complainant made such a statement and that Respondent's premise is a pretext for its actions.

Respondent has not offered an alternative reason for terminating Complainant. In fact, testimony by Respondent's dispatcher establishes that Complainant reportedevery day and previously had never refused to haul a dray. In addition, the deposition of Mr. Thiaville and a letter executed by Mr. James O'Brien, under the direction of Mr. Wactor, support a finding that Complainant never stated that he would drop a load "in the street." This Court does not find credible the testimony alleging that, although Complainant did not actually state that he would drop a load in the street, that it is what he "meant." Furthermore, Mr. Wactor admitted that he did not hear the alleged statement, but terminated Complainant based on a statement of Mr. James O'Brien.

Thus, this Court finds that a preponderance of the evidence supports a finding that

Complainant's termination was based on retaliatory animus created by Complainant's protected activity of an internal safety related complaint.

IV. Damages

An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA. Moravec v. HC & M Transportation, Inc., 90-STA-44 (Sec'y Jan. 6, 1992), *citing Hufstetler v. Roadway Express, inc.*, 85-STA-8 (Sec'y Aug. 21, 1986), slip op. At 50, *aff'd sub nom., Roadway Express, Inc. v. Brock,* 830 F.2d 179 (11th Cir. 1987). In Cook v. Guardian Lubricants, Inc., 95-STA-43 (ARB May 30, 1997), the judges use of calendar weeks, rounded to the closest full week, as the basic computation unit was found to be reasonable. The Board noted that back pay calculations must be reasonable and supported by the evidence of record, but need not be rendered with "unrealistic exactitude." Slip op. at 11-12 n. 12. The Secretary noted that back pay awards are, at best, approximate and any "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." Pettway v. American Cast Iron Pipe Co., Inc., 494 F.2d 211, 260-261 (5th Cir. 1974). Back pay awards to victorious whistleblowers in DOL adjudications are to be calculated in accordance with the make whole remedial scheme embodied in § 706 of Title VII pf the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988). *See* Loeffler v. Frank, 489 U.S. 549 (1988). Under the STAA, 49 U.S.C. app. § 2305(c), the employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. Hadley v. Southeast Coop. Serv. Co., 86-STA-24 (Sec'y June 28, 1991).

Once entitlement to back pay under STAA is awarded, it is error for the Court to deny interest on the back pay--interest should be added to recompense the employee for loss suffered because his employer unlawfully deprived him of the use of his money. Hufstetler v. Roadway

Express, Inc., 85-STA-8 (Sec'y Aug. 21, 1986), slip op. at 50, *aff'd sub nom.*, Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987). Secretarial decisions award interest on back pay under the STAA calculated in accordance with 26 U.S.C. § 6621 (1988), which specifies the rate for use in computing interest charged on underpayment of Federal taxes. Phillips v. MJB Contractors, 92-STA-22 (Sec'y Oct. 6, 1992).

The standard for determining whether the respondent has met its burden of establishing complainant's failure to mitigate damages is whether the complainant "intentionally or heedlessly" failed to protect his or her own interests. Ass't Sec'y & Lansdale v. Intermodal Cartage Co., Ltd., 94-STA-22 (Sec'y July 26, 1995), citing *Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 1986), *aff'd sub nom. Roadway Express, Inc. v. Brock,* 830 F.2d 179 (11th Cir. 1987). In Polwesky v. B & L, Lines, Inc., 90-STA-21 (Sec'y May 29, 1991), the Secretary apparently takes the position that an employer must show that jobs for a complainant were available during the back pay period to carry its burden of showing that the complainant failed to make reasonable efforts to mitigate damages resulting from his or her discharge in violation of STAA, 49 U.S.C. app. § 2305.

Damages for emotional distress and mental anguish as a result of complainants termination are compensable. Ass't Sec'y & Bingham v. Guaranteed Overnight Delivery, 95-STA-37 (ARB Sept. 5, 1996).

In Sickau v. Bulkmatic Transport Co., 94-STA-26 (Sec'y Oct. 21, 1994), the Secretary stated that in addition to payment of an attorney fee, a successful complainant is entitled to reimbursement of costs in bringing and prosecuting a complaint.

In the instant case, Respondent argues that only 22.5% of the pay earned during the one month period Complainant worked for Respondent was considered income. However, when Respondent hired Complainant the trip lease agreement included both Complainant and his vehicle. Accordingly, when Respondent terminated Complainant he also terminated Complainant's vehicle which resulted in injury to the Complainant in the total amount of wages. Therefore, this Court finds that Complainant is entitled to eight weeks of back wages from June 12, 1998 until August 10, 1998 the date he obtained suitable alternative employment. Complainant is also due wages through the month of September 1998 minus his interim earnings.

Utilizing the aforementioned calendar week method, Complainant earned $5,851.40 for the six weeks that he was in Respondent's employ which results in a weekly wage of $975.23. Therefore, for the period June 12, 1998 through August 10, 1998, Complainant is entitled to back wages of $7,801.84. In addition, wages in the amount of $5,851.38 minus interim earnings from Triple G Express of $3,881.21 are due Complainant through the month of September 1998 resulting in actual wages due for this period of $1,970.17. Thus, Complainant is due back wages

totaling $9,772.01.

Respondent has not met his burden of establishing that Complainant "intentionally and heedlessly" failed to mitigate damages. Complainant attempted to mitigate damages by seeking employment with Larsen Intermodal and Triple G Express. This Court finds credible Complainant's undisputed testimony that he discontinued employment with Larsen because he was operating at a loss due to a dearth of work. Additionally, Respondent has presented no evidence on job availability during the back pay period. Therefore, Respondent is not due a credit for Complainant's failure to mitigate damages.

This Court will not award damages for emotional distress as Complainant has not proven emotional distress as a result of his termination. However, this Court finds that Complainant is due $40.00 for litigation expenses related to payment for private counsel to determine rights under the STAA.

RECOMMENDED ORDER

It is, therefore, **ORDERED**, **ADJUDGED** and **DECREED** that:

(1) Respondent shall pay to Complainant back wages for the period of June 12**,** 1998 through August 10, 1998 of $7,701.84;

(2) Respondent shall pay to Complainant back wages through the month of September 1998 of $5,851.38 less $3,881.21 in interim wages thereby totaling $1,907.17;

(3) Respondent shall pay to Complainant interest on back pay calculated in accordance with 26 U.S.C. § 6621 (1998);

(4) Respondent shall pay to Complainant litigation expenses totaling $40.00.

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JAMES W. KERR, JR.
Administrative Law Judge

JWK/cmh

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982 (1996).